No. 20544

In the

United States Court of Appeals

For the Ninth Circuit

STOCKTON PORT DISTRICT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

REPLY BRIEF OF INTERVENER STATE OF CALIFORNIA

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DEDICATED TO THE ECONOMIC AND CIVIC DEVELOPMENT OF NORTHERN CALIFORNIA

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INTRODUCTION

The State of California intervened in this case on behalf of its agency the San Francisco Port Authority and in support of the position of respondents in the original docket. It has petitioned and has been granted leave to intervene in this court in support of the decision of the Federal Maritime Commission.

STATEMENT OF FACTS

Because the facts are outlined in detail in the decision of the Commission and have been discussed extensively in the brief of the Pacific Westbound Conference we shall endeavor to confine this discussion, in so far as possible, to a statement of the position of this intervener, the State of California.

The State of California has, for over 100 years, operated the Port of San Francisco through an agency now known as the San Francisco Port Authority and formerly called the Board of State Harbor Commissioners for San Francisco Harbor. The Port furnishes approximately seventy-six deep-water berths supplied with transit sheds, highway and rail facilities (1108, 1110-11)* for steamship lines connecting San Francisco and through it the State of California with approximately three hundred world ports (1118).

The Bay of San Francisco serves the entire geographic area. Immediately across the Bay from San Francisco are the deep-water facilities of Oakland, Encinal and Richmond. Southerly from San Francisco lies the deep-water Port of Redwood City, primarily a bulk port. The Army Base at Oakland also has deep-water facilities. Going up what is called San Pablo Bay we find specialized terminals located at Oleum, Rodeo, Hercules,

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*Page references are to the Reporter's Transcript unless otherwise noted.

Pinole, Crockett and Selby. There are also oil ports at Avon and Martinez. Deep-water facilities of private companies are located at Pittsburg and Antioch. Up the Sacramento River we now have the new Port of Sacramento and up the San Joaquin River the Port of Stockton (Ex. 60). To show the profusion of deep-water berths in the Bay we attach to the facing page a reproduction of Exhibit 60, which shows locations although it does not show distances. Not all of the facilities mentioned have terminal status in the Pacific Westbound Conference but that Conference has afforded terminal status to Alameda, Oakland, Richmond, Stockton and Sacramento in addition to San Francisco (1117). Vessels may, of course, also have occasion to shift for specialized or military cargo.

The Port of San Francisco is entirely self-supporting. It was created without expense either to the State of California or the federal government and does not obtain funds from any tax roll. Major improvements are financed through general obligation or revenue bonds. Because maintenance of older structures has been so expensive, the Port is presently engaged in building new facilities financed through the issuance of $26,000,000 in general obligation bonds (1143-1144). These bonds and earlier bonds issued and outstanding will have to be repaid through Port revenues. Any material decrease in those revenues would seriously affect the financial ability of the Port to service

its outstanding obligation (1144).

The tonnages of the Port of San Francisco have remained virtually static for the last few years although the tonnages of the Port of Stockton have risen dramatically (144). This relation in Stockton-San Francisco traffic is also reflected in the tonnage figures of the Pacific Westbound Conference itself (Exs. 44, 46). All of the ports in the Bay compete with one another for cargo. To accomplish this San Francisco, like the other ports, has maintained an active solicitation program (1130-1131). Largely by reason of this, the number of stops which a carrier is now expected to make in the Bay has created a monstrously uneconomic situation with vessels commonly making three or four or more stops in this highly confined area (765-66, 793-95). The only economic means of protection which the carrier has is equalization and this it can and should utilize where the competing ports serve the same tributary territory. This is the basis of the Commission's decision.

Wharfage and dockage rates of the Port of San Francisco and the Port of Stockton are identical (Exs. 61, 62). Since terminal rates are the same and steamship rates are required by law to be the same, San Francisco endeavors to attract cargo on the basis of its superior number of direct sailings; its temporate climate which is frequently of benefit to more perishable cargo and its wider range of facilities (1131). It is the

position of this intervener that all of San Francisco Bay and the ports which feed into it must for purposes of determining tributary territory, be considered as a single basin. In that basin certain ports have tended to become specialized. San Francisco, because of its location, is predominently a general cargo port, a port with last loading for the Pacific Westbound, Pacific Straits and Pacific Indonesian Conferences and thus a port which establishes itself as particularly attractive for perishables. It is the position of this intervener that all of the terminal ports in this area should be treated as one group rather than considered as isolated ports with separate tributary territory (1132).

The Port of San Francisco is located on the point of a thin peninsula of land bounded on one side by the Pacific Ocean and on the other by the Bay of San Francisco (1120). If Stockton's position on tributary territory were to prevail, the Port of San Francisco which the State built and has maintained would have as its tributary territory a thin wedge of land lying along the Pacific Ocean roughly from San Luis Obispo to slightly below the Mendocino County line. Even this, however, would be subject on the Stockton theory, to the exceptions of territory tributary to Redwood City, Alameda, Oakland, Richmond and many other ports in the territory itself and even this would change at the whim of cities and counties which elected to bring deep-water facilities to their communities. The Stockton theory

of tributary territory is that where the inland mileage rate is cheaper to one terminal port than to another terminal port the territory from which it is cheaper is the tributary territory of the cheaper port (37, 43; Exs. 4, 8, 9).

The Federal Maritime Commission refused to accept this doctrine. In its decision the Commission stated:

> "Stockton's argument for recognition of most of central California, including the great San Joaquin Valley, as its naturally tributary territory is based entirely upon minimum trucking rates to Stockton, which in turn are based upon the 'constructive mileage' between points of origin and Stockton. (Footnote omitted) Stockton contends that the examiner misconstrued the applicable precedents in finding that Stockton's tributary territory was also San Francisco's. As Stockton reads the cases 'tributary territory' is that area from which the inland transportation rates and mileages are less to a particular port than some other port. But Stockton's theory is only deceptively simple and does not comport with the principles laid down in prior cases. Under this 'constructive mileage' theory the naturally tributary territory expands and contracts with every new

highway innovation because constructive mileage changes with new bridges, traffic lights and the like. Under Stockton's theory the territory is dependent upon which ports are named 'terminal ports' by the carriers practicing the equlization. Thus, when the respondent Pacific Westbound Conference, but not the Straits or Indonesian Conferences, named Sacramento as a terminal port, Stockton's own witness, Mr. Phelps, stated that Stockton's tributary territory for the Pacific Westbound Conference was thereupon cut in half because 'that is the way the arithmetic comes out.'

". . . .

"Although Stockton urges that the examiner's reliance on the Beaumont decision is misplaced we think it reasonable, well founded and proper. Moreover, the Maritime Administration, Department of Commerce, and the Corps of Engineers, Department of the Army, the governmental agencies charged with administering section 8, in their joint publication ('The Ports of San Francisco and Redwood City, Calif.' Port Series, No. 30, Rev. 1951.[7/]) covering the port of San Francisco, described San Francisco as 'one of the most important ports for the vast inland territory of the Central and Pacific Coast

Area and the Intermountain States,' under the heading 'Tributary Territory.' In their publication covering Stockton, the 'Tributary territory' designated as that of Stockton is wholly within the territory attributed to San Francisco, and largely within the territory attributed to Oakland-Alameda in the publication covering those ports. It is obvious that these studies dictate a rejection of any 'constructive mileage' theory for determining 'naturally tributary territory.'

"We conclude, that for the purposes of this proceeding, the territory naturally tributary to Stockton should properly be considered naturally tributary to San Francisco and other San Francisco Bay area ports. . . ." (FMC Dec. pp. 14-16; R. 1279-1281.)

The Federal Maritime Commission based its decision on the principle that the equalization it permitted in this case reflected an overall economic good, was of tangible benefit to the public at large, and had an important transportion justification. (FMC Dec, p. 20; R. 1285.) The State agrees that the primary concern of the Commission, and thus of this court, must be the benefits to be regarded from the view of the overall public good. To the shipper equalization is a tremendous advantage. It enables cargo to reach

a vessel at the location best from the shipper's view. It enables the ship to have the operating latitude necessary if it is to serve a vast complex of terminal ports all located in one small area. It allows the seaports located farthest from the producing area but closest to the point at which the ocean voyage commences to compete with off ports located in the heart of the producing areas. In some instances it may even enable a shipper to compete in world markets he might otherwise lose (1133-1135; 1138).

Where a port in the hinterland has successfully solicited cargo, the ship if it is to accommodate the cargo, has only two alternatives if it cannot employ equalization. It can proceed to the port in question or it can transship by truck or barge at the carrier's expense. The Commission finds that the voyage to Stockton takes a vessel a minimum of eight hours in either direction. In addition, there are costs for pilotage, tugs and other incidental expenses, totaling approximately $3,000 to $4,000 per call. Transshipment costs the vessel approximately $6.00 to $7.50 per ton while equalization costs the vessel on the average of $2.00 to $2.50 per ton. (FMC Dec., p. 7; R. 1272.)

In the case of transshipment the owner has paid the cost of transportation to the nearest port and the port costs; the carrier must pay the cost of transportation to

the port of loading and in addition, it must pay all of the port costs at the loading port (761-763). It also involves rehandling of cargo which is undesirable both from the ship and the shipper's view (813-14; 845; 984; 1005; 1033; FMC Dec., p. 4; R. 1269).

Based on these primary considerations it is the State's position that the decision of the Commission is correct and should be affirmed.

If equalization were not permitted among all of the ports in the Bay area there is no question but that the Port of San Francisco would suffer serious financial damage. It is geographically further from the large producing area and since it exists on a thin peninsula of land served by busy highways and toll bridges inland transportation rates to San Francisco are commensurately greater. The Port of San Francisco was built and has been maintained in reliance on its revenues. Without an equalization rule those revenues can be seriously impaired (133; 1134-35; 1143-45). In constructing the port, the State relied on the fact the area it built served the entire region and would continue to do so. Had this not been so, San Francisco would have been forced to oppose other major improvement in the Bay and this would scarcely have served the public need. The Commission, in its decision, recognizes the basic principle and states:

"For almost a hundred years before Stockton was made accessible to oceangoing vessels, San Francisco was the principal port through which freight from the San Joaquin Valley would and did pass. It did not cease to be such a port merely upon the creation of an additional port at Stockton." (FMC Dec., p. 13; R. 1278.)

The economic health of the Port of San Francisco is of importance to the commerce of the United States both as a naval auxiliary and to meet certain requirements best served by ports located closest to the Golden Gate. In times of national emergency it is extremely important to have adequate existing facilities in good repair and geared to the efficient handling of cargo as close to the ocean as possible.

Considerations in support of the economic welfare of an important port are another basis for the position taken by the State in this case.

ARGUMENT

I

THE COMMISSION'S DECISION IS BASED ON SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED

The first question before any reviewing court is whether the decision of an administrative body is based on

substantial evidence. In this case the evidence is not only substantial but virtually uncontradicted. Both the carriers and shippers have testified that equalization, as permitted under the Conference provision, is of benefit to them and in the public interest (886-87; 909-979-80; 1032; 1086-87; 1138-39).

The Commission finds it would have cost approximately $67,000 more to have sent fifty ships to Stockton than to have equalization (FMC Dec., p. 14; R. 1279). Obviously this additional cost is detrimental to the shipping public. The ability to equalize also carries affirmative benefits to the shippers. It insures frequent and regular service to meet shipping needs, the ability to meet delivery dates and assistance in the shipping of perishable products (811-12; 842-43; 905-6; 1031-1033). Only one shipper witness was presented by Stockton in support of its opposition to equalization and in his testimony it developed that his principal concern was not with equalization but with his endeavor to secure a greater amount of equalization than the Conference permitted (554-63; 574; 578-598). He then frankly admitted to the Examiner that he supported Stockton's position on the assumption that if there were no equalization there would be an adjustment in rates (601). Since the evidence conclusively proved that the cost of sending ships to Stockton would be more expensive than equalization the basis for his

opposition was conclusively dissipated.

While we are dealing with many ports and terminals in the Bay area we are concerned with only one harbor. With equalization the shipper and the steamship lines are at the mercy of numerous ports and terminals who have elected to compete with one another, frequently as a matter of local geographic pride. Equalization in this instance serves the interests of the steamship lines and the shipping public.

The steamship lines have devised two weapons for their own protection. One is transshipment. This is a costly and serious burden both to commerce and to the shipper whose goods are necessarily rehandled. If a part of the Federal Maritime Commission's function is to protect the commerce of the United States, we believe the Commission should, whenever possible, discourage transshipment in favor of equalization.

The second weapon is equalization. While the terminals tend to dislike the use of equalization when used against them, all fair-minded people would have to recognize from ship management's point of view and the shipper's viewpoint equalization is by far the soundest device. When ports are located in the hinterland of a single water complex, it stands to reason the shipper will tend to use the terminal closest to his point of origin to save every possible penny of inland

transportation costs. Even so, however, the trip to an additional berth for a single lot of cargo available at that moment may not be worth the cost of further shifting the vessel. We learned from the only steamship witness favorable to the Port of Stockton that even where his ships came to Stockton to load bulk or army cargo it was frequently not worth the cost of a shift to another berth in Stockton to pick up general cargo and that in instances his company had picked up that cargo by transshipment or equalization even though the vessel had actually called at Stockton (Ex.17).

Because of the numerous berths in the Bay area it is obvious a vessel could spend an unbelievable amount of time in this harbor shifting from competing port to competing port for odd lots of cargo. Such wasteful practices do not fulfill the needs of commerce.

The evidence on which the decision relies to support its conclusion that equalization is for the greater public good is uncontradicted. On review this court may not set aside the findings or conclusions of the Commission unless they are ". . . 'found to be (1) arbitrary, capricious, (or) an abuse of discretion . . . (or) (5) unsupported by substantial evidence. . . .'" The court has "defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . . This is something less than the weight of the evidence, and

the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. FMC, ____U.S.____ (1966); 16 L.Ed. 2d 131.

II

THE COMMISSION'S DECISION IS IN ACCORDANCE WITH EXISTING LAW AND SHOULD BE AFFIRMED

There is nothing inherently unlawful about equalization. In determining whether a particular equalization practice is lawful the Commission looks "to the economies" and the "natural flow of commerce." Thus where the berth facilities of two or more ports are located in and serve one area, a distinction is made between that case and the case where the facilities are located in, and serve, different geographic areas.

Port Comm. of Beaumont v. Seatrain Lines, 2 USMC 500; (1941)

Port Comm. of Beaumont v. Seatrain Lines, 2 USMC 699; (1943)

Beaumont Port Commission v. Seatrain Lines, Inc., 3 FMB 566; (1951)

In City of Portland v. Pacific Westbound Conference, 5 FMB 118, the Commission found certain equalization practices of the Conference unlawful but it also found that equalization practices on explosives from Dupont, Washington were justified because of inadequacy of direction steamship service to the

Philippines and would continue to be justified until direct monthly sailings were provided. The two orders referred to above were reviewed by the Appellate Court in Pacific Far East Line, Inc. v. U.S., 246 F(2d) 711 (1957) and were upheld.

To find equalization unlawful, the Commission must first find a violation of law. As the decision points out, contrary to Stockton's position, the equalization practice approved by the Commission does not violate sections 16 and 17 of the Shipping Act because the discrimination and prejudice prohibited under those sections is discrimination which is unjust and unreasonable. Differences in treatment based on valid reasons are not violations of the Shipping Act. (West Indies Fruit Company v. Flota Mercante Grancolombiana, 47 FMC 66 (1962).

The basis of the Commission decision is that equalization is a proper device where the cargo being equalized comes from territory tributary to the port of loading. What is tributary depends on the facts of the particular case. It includes not only geographic considerations but such other criteria as frequency of service. The whole basis of Stockton's objection lies in its concept, which finds no support whatever in law, that cargo cannot be tributary to more than one place of loading. Contrary to what Stockton asserts, the Commission did not place Stockton on the shore of the Golden Gate but it

did find that the entire flow of ocean traffic from the entire geographical area was to the Pacific Ocean via the Golden Gate. (FMC Dec., p. 11; R. 1276.) The concurring opinion correctly points out that a carrier servicing Stockton must pass San Francisco at least twice. Therefore if Stockton is served, San Francisco is served. (FMC Dec., p. 19; R. 1284.)

Stockton has an ingenious theory of tributary territory which we have outlined in our statement of facts, infra. (See R. 1279.) If Stockton were correct, there would be no reason for the Commission to ever determine tributary territory since the determination would be a mere mechanical exercise. Obviously, Congress intended no such result when it directed the Departments of Commerce and Defense, pursuant to Section 8 of of the Merchant Marine Act, 1920 "to investigate territorial regions and zones tributary to . . . ports, taking into consideration the economies of transportation by rail, water and highway and the natural direction of the flow of commerce; . . . ." (46 U.S.C. 867.) Exhibits 47 to 50 in this record show the findings of the Maritime Administration in connection with territory tributary to Sacramento, Stockton, San Francisco, Oakland and Alameda. The conclusion of the Federal Maritime Commission in this case is consistent with those findings.

III

STOCKTON'S ALLEGED "SPECIFICATIONS OF ERROR" ARE FALLACIOUS

The brief of the Pacific Westbound Conference sets forth each alleged basis of error and conclusively refutes its validity. To avoid unnecessary repetition, this intervener adopts the arguments made by the Conference. (See PWC Brief, pp. 6-9.)

Concisely, we agree there is no showing of a violation of Section 8 of the Merchant Marine Act, 1920, (46 U.S.C. 867). Stockton bases a portion of this argument on the principle that equalization is a "rebate." Equalization is not a rebate. No profit accrues to the shipper or to the owner of the goods. All a carrier does when equalizing is to pay, itself, that portion of the inland transportation cost between the closest port of loading and the port of loading which the carrier for its own convenience elects to use. Nothing in Section 8 prevents this.

Section 205 of the Merchant Marine Act, 1936, (46 U.S.C. 1115) assures that there will be no rate discrimination. There is no rate discrimination. This section does not prohibit equalization.

Stockton's remaining arguments, based on the theory that equalization affords a rebate, are are incorrect and unsound. This is not a rebate case.

The last argument of Stockton that there is a violation of the Fifth Amendment of the Constitution is incorrect because it is based on the principle that Stockton has a property right in the cargo it alleges should move through Stockton. This is not true and is effectively disspelled in the brief of the Conference (PWC Brief, p. 49) and in our discussion, infra, showing the cargo, in fact, remains tributary to San Francisco.

CONCLUSION

We respectfully petition the decision of the Federal Maritime Commission be affirmed.

Respectfully submitted,

THOMAS C. LYNCH, Attorney General
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Attorneys for Intervener,

STATE OF CALIFORNIA

Dated: San Francisco, California, August 12, 1966

Certificate of Counsel and of Service

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

I further certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing, postage prepaid, a copy to Honorable Nicholas deB. Katzenbach, Attorney General of the United States, attention of Irwin A. Seibel, and a copy to Federal Maritime Commission, attention of Walter H. Mayo III, attorneys for the respondents; a copy to James L. Pimper, General Counsel, Federal Maritime Commission; a copy to Albert E. Cronin, Jr. and J. Richard Townsend, attorneys for the petitioner; a copy to Leonard G. James, attorney for interveners Pacific Straits Conference and Pacific/Indonesian Conference and member lines; and a copy to Lillick, Geary, Wheat, Adams & Charles, attention of Gordon L. Poole, attorneys for Pacific Westbound Conference and members.

Dated at San Francisco, California, August 12, 1966.

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